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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL LUCIO FRAUSTO, Defendant and Appellant.	H042253 (Santa Clara County Super. Ct. No. C1071221)

Defendant Michael Lucio Frausto appeals from a judgment entered after a jury found him guilty of one count of first degree murder (Pen. Code, § 187 - count 1),[1] four counts of attempted murder (§§ 664, subd. (a), 187 - counts 2, 3, 4, & 5), and one count of shooting at an inhabited building (§ 246 - count 6). As to each count, the jury found that defendant personally discharged a firearm causing the death of a person who was not an accomplice (former § 12022.53, subd. (d)). The trial court sentenced defendant to a term of 25 years to life for count 1, life with the possibility of parole for counts 2 through 5, plus 25 years to life for each of the five firearm enhancements on counts 1 through 5. The trial court also imposed a determinate term of seven years for count 6 plus 25 years to life term for the firearm enhancement, which was to run concurrently to the other counts. Defendant's aggregate term was 178 years to life.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

On appeal, defendant contends: (1) the trial court erred when it admitted expert testimony based on historical cell tower information; (2) trial counsel provided ineffective assistance by asking questions on cross-examination that opened the door to the admission of damaging evidence; (4) the trial court violated his right to confrontation when it allowed the prosecutor to ask leading questions to a witness who had refused to testify; (5) the trial court erred when it excluded evidence that other individuals had a motive to shoot one of the victims; (6) the case must be remanded to allow the trial court to exercise its discretion to strike some or all of the firearm enhancements; (7) he is entitled to remand for the purpose of making a record of the facts relevant to the youth offender parole hearing he will receive during his 25th year of incarceration; and (8) the abstract of judgment must be modified to indicate that the sentence on count 6 is concurrent. The judgment is reversed. The matter is remanded to allow the trial court: (1) to consider exercising its discretion to strike any firearm enhancements; (2) to allow defendant to the opportunity to make a record of information that will be relevant in a future parole eligibility hearing; and (3) to modify the abstract of judgment.

I. Statement of Facts

A. Prosecution Case

1. The Shooting

On January 23, 2010, Leonel Acosta, Ricardo Mendez, Andrew Sotelo, Santos Munoz, and Albert Cobarrubias were playing pool in Cobarrubias's garage on Chopin Avenue in San Jose. Shortly before 11:00 p.m.,[2] a man walked up the driveway and fired at least six shots from a .38 caliber revolver into the open garage door. Cobarrubias was killed. Sotelo described the shooter as a Mexican man in his late 20's with dark "slicked back" hair and a mustache. The shooter was wearing a white T-shirt. After the shooting,

[2] The 911 call was made at 10:57:11 p.m.

the shooter entered the passenger side of a "boxy," white four-door sedan, possibly a mid-90's Toyota.

David Castaneda, Cobarrubias's brother, was in his bedroom when he heard the gunshots. He ran to the garage and saw his brother on the floor. Castaneda heard the sound of bad brakes, that is, "a real squeaky noise" as a car left the area. Castaneda's house is in the Meadow Fair neighborhood. According to Castaneda, Cobarrubias hung out with members of the Varrio Meadow Fair (VMF) gang.

Munoz was a member of the VMF gang. Munoz believed that he was the target of the shooting, because he "was having some issues with [his] baby's mom and her boyfriend. And rumors had came about that . . . he had come to kill [him]." Munoz also told the police that he had had a problem with some Sureno gang members and he thought that they might have been after him.

2. The Stutz Way Stabbings

On August 2, 2009, defendant, Raymond Frausto (Raymond), one of defendant's brothers, and Miguel Garcia went to Stutz Way where they were "partying with Meadow Fair girls." At some point during the party, Priscilla Olivo was disrespected by a "light-skinned guy with four dots under his left eye."[3] Olivo called her boyfriend Steven Barajas to complain. When Barajas insulted defendant, Olivo relayed the insult to defendant. Defendant replied, "[F]uck your boyfriend." Defendant, who had tattoos indicating membership in Eastbound Loco Mob (EBLM), believed that Barajas was a member of VMF. Shortly after the phone call, 10 to 15 members of VMF arrived at the house and attacked defendant, Raymond, and Garcia. The three men suffered life-threatening injuries from multiple stab wounds.

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[3] Defendant matched this description.

3. Luz Beltran and Joseph Tarango

Beltran and defendant had been friends since high school. On the night of the shooting, defendant asked Beltran if he could borrow her 1995 Toyota Camry. He told her that he needed to take his cousin home and he did not have gas in his car. Though she said no, he persisted and asked her over 20 times. She finally agreed to lend him her car so he would stop bothering her.

At about 10:00 p.m., defendant arrived at Beltran's house in his Cadillac and called her. She went outside and they exchanged keys. He left and returned about a half an hour to an hour later.[4] While defendant was using her car, Beltran made several calls to his cell phone, but he did not answer. When defendant returned the car, he was alone and did not say where he had gone. However, he told Beltran that he did not pick up his cousin. Defendant called her later that night and told her to put air freshener in her car. She asked him why and he would not tell her. At one point in the conversation, he said, "[J]ust fucking do it." Beltran called defendant several more times that night, but he ignored her calls.[5]

Later that same night, when Beltran picked up some friends in downtown San Jose, she saw defendant driving his Cadillac. Shortly thereafter, he called her and said, "What the fuck [are you] doing downtown . . . go home." The following day, defendant told her that he needed to talk to her because he did "something dirty." He told her that if

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[4] Defendant was wearing a black shirt and black sweatpants when he picked up and returned Beltran's car.

[5] Amanda Garcia, one of Cobarrubias's neighbors, was driving on Chopin Avenue on the night of the shooting. She was behind a white car with its headlights off. The car moved very slowly, pulled over near the corner of Chopin Avenue and Puccini Avenue, and let her pass. When Garcia arrived at her destination, the car passed "really fast with the headlights off." She described the car as a 90's Honda, Nissan, or Subaru, which was "[s]quare. Like box[y]." When the police showed Garcia a photograph of Beltran's car, she told them that "it looked the same except for a spoiler."

the police contacted her, she was "[n]ot to talk to them, and tell them that [she] didn't know him."

Joseph Tarango was Beltran's boyfriend at the time of the shooting. Tarango was a member of EBLM. According to Tarango, defendant left EBLM on bad terms in 2008 because he no longer wanted to be involved in violent confrontations with other gangs.

Tarango was in custody in county jail[6] when he learned from Beltran that defendant had borrowed her car and returned it, and that the police had confiscated it a few days later. Tarango believed that defendant had violated the fourth bond of the Norteno "constitution," which prohibited a Norteno from taking advantage of another Norteno's family member. Tarango eventually found out that defendant had been charged with murder and was also in custody. They were housed on the same floor, but in different dormitories.

Tarango reported to higher-ranking Nortenos in jail that he wanted defendant disciplined for using Beltran's car to commit a crime. Tarango believed that the discipline defendant eventually received was too lenient. Tarango then attempted to impose his own discipline with a fellow Norteno named Wicked, but nothing ever happened to defendant.

While they were in jail, Tarango asked defendant why he had used Beltran's car to "smoke somebody." Defendant responded, "[T]hey got my brother." According to Tarango, defendant then "kind of shook it off as to [he] didn't think it would be traced back to her. [He] didn't think anything was gonna come of it" because he told Beltran to wipe the car down.

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[6] Tarango was in custody on two attempted murders charges and faced 34 years and four months in prison. Pursuant to a negotiated plea agreement, he eventually pleaded guilty to lesser charges and agreed to cooperate with the prosecution on "certain cases," but the present case was not specifically identified. Tarango was sentenced to 10 years and six months.

4. Defendant's Broken Date with Collins

Claudia Sandoval Collins had a sexual relationship with defendant. On the night of the shooting, Collins and defendant exchanged a series of text messages in which they made plans to meet that night. This exchange ended at 7:06:44 p.m. Defendant never showed up. The next text messages began 43 minutes after midnight, when Collins chastised defendant for failing to show up. Defendant replied, "I'm hella sick." Collins texted him not to "hit [her] up anymore."

5. Defendant's Admissions

David Espinoza, defendant's brother,[7] lived in a studio apartment in a duplex. Steven Sosa lived in the other studio apartment. The two apartments were connected by a door. The day after the shooting, Sosa and his friends, Odell Warren and Robert Moreno, were watching the NFL playoff game.[8] Defendant entered Sosa's apartment through the door from Espinoza's apartment. Defendant told them that "he got the guys who got them," which Warren interpreted as the individuals "who had stabbed [defendant] and his brother." Defendant said, "'I just blasted these fools last night. Yeah. Then I was driving by and they were slipping and I ran up in their driveway and I shot.'" Defendant said that he used a .38 small revolver. Warren assumed that he had used a Smith and Wesson revolver, because he had previously seen defendant with one. Warren also overheard defendant say something about burning his clothes and needed to get gun residue off of him.[9]

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[7] Defendant and Raymond have their mother's last name while Espinoza has their father's last name.

[8] The trial court took judicial notice of the fact that the NFL playoff game in 2010 was played on January 24.

[9] Warren was a police informant, who was under investigation for selling drugs. Warren had been told that he could avoid charges by providing information about other crimes. Warren also believed that defendant's cousin, Armando Frausto, Jr. (Armando), had informed on him on the drug case.

Other witnesses corroborated Warren's testimony regarding defendant's admissions. Sosa remembered that one of Espinoza's brothers, defendant, who was "the smaller one,"[10] arrived while they were watching the game. Sosa told the police that he heard someone say something like "'we shot somebody.'" According to Sosa, he, Warren, and Moreno did not make this statement and defendant was the only other person who was present. Sosa did not know whether the statement was true. Moreno heard something "[a]long the lines that 'we had capped these fools.'" Though he denied it on the stand, Moreno told the police that one of Espinoza's brothers made this statement.

6. Defendant's Arrest

On March 4, 2010, police officers were conducting a surveillance of defendant. After defendant noticed the officers, he attempted to evade them. He drove his white Cadillac erratically, exited his vehicle, walked through a church parking lot, ran through a school, and returned to his residence in a black Altima driven by a Hispanic male. Defendant was eventually arrested at his residence. During a search of the residence, officers found two cell phones and numerous items of clothing indicating gang membership. They did not find any firearms or ammunition.

7. Disposal of the Gun

After defendant was arrested, Armando was arrested on a parole warrant. He told the police that defendant had admitted that he committed the shooting. He also stated that he sold a .38 revolver and some bullets in a sock to "Elias" for $200 and narcotics.[11]

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[10] Espinoza is six feet tall, Raymond is five feet nine inches, and defendant is five feet four inches.

[11] These statements were admitted only for the jury's determination of the thoroughness of the police investigation.

The police located and interviewed Eliodoro Ceballos, whose nickname was Elias. Ceballos was living in San Jose in 2010.[12] He was arrested on September 1, 2010. Several months before his arrest, Ceballos bought a .38 short-barreled revolver and some bullets in a sock from a Hispanic man in his late 20's or early 30's in exchange for cash and methamphetamine.[13] The transaction took place at a house where Ceballos had previously gone to sell drugs.[14] He sold the gun and kept the sock with the bullets in his house. He took the sock with him when he moved to a residence on Pistachio Drive.

The police later found the sock with 163 bullets in it during an unrelated parole search of Ceballos's residence on Pistachio Drive. Eric Barloewen, an expert in ballistics and the operation of firearms, compared three bullets from the crime scene to the .38 caliber bullets loaded in the unfired cartridges from the sock. The bullets were not commercially manufactured, but were hand-loaded or reloaded. The bullets from the sock had a blue lubricant in the lubricant grooves. Barloewen described the lubricant on one of the bullets recovered from Corrubia's body as lavender, but characterized the lubricant on a photograph of the same bullet as blue. Though there was some variation in the color of the bullets, the chemical composition of all the bullets was the same. According to Barloewen, the gun from which the fatal bullets were fired was not a Smith and Wesson.

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[12] Ceballos testified under a grant of immunity at a conditional examination. He was in federal custody awaiting deportation. Video recordings of Ceballos conditional examination were admitted into evidence.

[13] Armando was present in the courtroom during Ceballos's testimony. When asked if he bought the gun from Armando, Ceballos testified: "I'm not 100 percent sure. I couldn't tell you yes or I couldn't tell you no."

[14] Carmen Brito and her children, including Roman Valles, lived at the house where Ceballos bought the gun and bullets. She is Armando's second cousin. Anthony Brito is her cousin. Anthony Brito told Armando in a recorded jail phone call that he had talked to his lawyer about contacting Roman and his lawyer told him not to "say shit" on the phone because the DA might be listening. Anthony Brito also told Armando that he had talked to Roman and his family.

Michelle Bell testified as an expert in the area of DNA extraction and analysis. She found a DNA mixture of at least three individuals from scrapings of the interior of the sock that was found at Ceballos's residence. The parties stipulated that she compared the DNA samples from defendant, Raymond, and Armando with the DNA extracted from the sock. Bell was unable to include or exclude defendant, Raymond, or Armando as the source of the DNA on the sock.

Though Armando was granted immunity, he refused to answer the prosecutor's questions. The trial court held him in contempt. The parties stipulated: "Armando Frausto was charged with the following crime. On and after January 24, 2010, in the County of Santa Clara, . . . the crime of accessory, in violation of Penal Code 32, a felony, was committed by Armando Frausto, who did aid a principal in a felony, murder, in violation of Section 187 . . . after the felony had been committed, and with knowledge that the principal had committed the felony with the intent that he might avoid, escape arrest, trial, conviction, and punishment." On October 9, 2012, Armando pled no contest to the charge. On February 22, 2013, Armando was sentenced to 15 years in prison.[15]

8. Cell Phone Evidence

Jim Cook testified as an expert in the areas of cell phone operations, cell phone towers and sectors, and interpretation of cell phone records. He explained that a cell phone uses radio wave technology, similar to FM broadcast transmissions that "work[] basically on a line of sight." A cell phone operates as both a receiver and a transmitter. The Mobile Telephone Switching Office (MTSO) is "like a computer that makes decisions about which cell towers will handle a call." The MTSO routes calls in the most economical fashion and connects them to the tower with the strongest signal, which is typically the closest tower to the cell phone. However, calls may be transferred to

[15] The trial court instructed the jury that this evidence was to be considered for the limited purpose of the thoroughness of Detective Anthony Mata's investigation and/or whether Armando had a motive with respect to his refusal to testify in the proceedings.

another tower when significant structures, foliage, terrain, and heavy call volume interfere with reception or transmission. As a cell phone changes location, the MTSO may transfer the call to another tower with a stronger signal. The MTSO stores information on a cell tower that was used by a particular cell phone at a given time.

The antennas or sectors on cell phone towers handle calls from different directions and cover a circular area. Metro PCS, which was defendant's cell phone carrier, generally has three 120-degree sectors on its cell towers. The coverage of the towers overlaps 10 to 15 degrees. The carrier cell site list maintains information on the number of sectors in a cell tower as well as information on the geographic orientation of each sector.

Cook travelled to the locations and towers relevant to the present case to determine if the topography or some obstruction would interfere with communication between the location and the tower. He found no major obstacles. Cook also opined that the period of time at issue in this case was off-peak and thus a call would not have been shifted to an adjacent cell tower.

Cook reviewed the cell phone records of defendant and Beltran. He created "Call Activity Maps" showing the times of the phone calls and the towers and sectors to which the phone connected when the calls began and ended. He explained that the circles depicted on the maps were an estimation of coverage and radio waves did not stop at the perimeter.

On January 23, 2010, there were multiple calls between defendant's cell phone and Beltran's that connected to towers near his Serrano Avenue residence. There was a call at approximately 10:30 p.m. that connected to a tower near Beltran's residence.

Defendant's cell phone was turned off from 10:51:40 p.m. through 10:59:46 p.m. Cook made this determination based on Metro PCS records indicating that the calls made

during this period never connected to a cell tower and went to voicemail. The 911 call following the shooting was made at 10:57:22 p.m.

Defendant's phone was turned on to receive a call from Raymond at 11:02 p.m. At this time, defendant's phone connected to a tower which was near the crime scene on Chopin Avenue. Cook opined that the phone was moving in a northwesterly direction because it connected to a different tower and sector at the end of the call. At 11:03:18 p.m., there was an outgoing call to Beltran's phone, which lasted for two seconds. Defendant's phone connected to a different sector of the same tower and thus corroborated Cook's opinion that the phone was travelling northwest.

At 11:03:30 p.m., there was an outgoing 13-second call to a number not identified in the record, which connected to the tower nearest to Beltran's house. About six minutes later, there was an outgoing call to Beltran's phone that lasted one minute and eight seconds. The phone initially connected to a tower close to defendant's residence on Serrano Avenue and terminated from a tower near Beltran's residence. There were then three calls to Beltran's phone that connected to the tower in her neighborhood followed by three calls which connected to the tower in defendant's neighborhood.

According to Cook, the records indicated that the cell phone travelled from somewhere near the crime scene to Beltran's house. However, he could not testify as to the exact location of the phone at any given time.

On January 24, 2010, defendant switched his service to a new phone, but kept his number.

B. Defense Case

1. Cell Phone Evidence

Manfred Schenk, testified as an expert in the areas of telecommunications, cell tower operations, and electronic communication. Schenk testified that Cook's analysis

was based on invalid assumptions because it did not account for the distances that radio waves could conceivably travel or cell phone traffic at peak times. He also testified that there was no justification for Cook's diagrams showing circles around the cell tower and explained that the implication that the cell phone user and/or his handset was located within one of the circles was misleading. Schenk conceded that geographic proximity to a tower was a factor. However, he relied on a National Institute of Standards and Technology (NIST) study that found a cell phone can connect to a tower 21.6 miles away. Schenk acknowledged that obstructions, terrain, and other factors would affect how far a signal could travel, but he did not observe the location of the towers relevant to the present case. He also noted that he did not disagree with the NIST that one should be cautious in interpreting call detail records to assess the location of a cell phone. Schenk opined that it was very difficult to determine whether a phone was moving in a particular direction based solely on the towers and sectors that the call traverses from the beginning to the end. This determination could only be made when the distance involved was 20 to 30 miles.

2. Police Investigation

Sergeant David Gutierrez did not check Beltran's car to determine if it had brake problems after one of the witnesses said that the vehicle that sped away from the crime scene had bad brakes. Sergeant Gutierrez acknowledged that Munoz told him that he had previously been shot at, but he noted that Munoz did not report this shooting to the police. According to Sergeant Gutierrez, Munoz thought he was one of the targets in the present case. However, Sergeant Gutierrez did not have any specific leads that the target of the shooting was Munoz. He thought that Raymond was possibly either the shooter or the driver of the car and interviewed him. However, no witnesses identified Raymond as being involved.

Detective Mata also received information that Munoz might have been specifically targeted for the shooting. Someone told him that Munoz's former girlfriend had hired someone to kill him, but Detective Mata could not corroborate this information. Detective Mata asked Raymond and other witnesses about Raymond's involvement. Since "no one mentioned that," the investigation as to Raymond did not proceed. Detective Mata also asked Armando if he was in the car at the time of the shootings. Armando said that he was not involved and Detective Mata believed him.

II. Discussion

A. Admissibility of Expert Testimony on Cell Phones

Defendant contends that the trial court erred when it admitted expert testimony that relied on the "granulization theory" to pinpoint defendant's location from historical cell tower information without holding a *Kelly*[16] hearing. He also contends that the trial court erred when it qualified Cook as an expert.

1. Background

Defendant brought a motion in limine for an evidentiary hearing pursuant to Evidence Code section 402 to determine the admissibility of cell phone evidence. He argued that it was not generally accepted in the scientific community that historical cell phone records could identify the location of an individual who was using the cell phone at a particular time. The prosecutor responded that cell phone evidence had been admitted in numerous cases and noted that Cook had previously been qualified as an expert in radio frequency communications in many cases throughout the state. He stated that Cook would explain business records of cell phone companies, how cell towers

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[16] *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*). The rule was previously referred to as the *Kelly-Frye* rule. However, due to changes in federal law, *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013 was superseded and the rule is now known in California as the *Kelly* rule. (See *People v. Bolden* (2002) 29 Cal.4th 515, 545.)

function, and where the sectors are on a cell tower, but he would not testify "where the defendant or the other caller was within a particular sector." The trial court ordered briefing on the issue.

Relying on *United States v. Evans* (N.D. Ill. 2012) 892 F.Supp.2d 949 (*Evans*), defendant argued that the proposed expert testimony was unreliable. He asserted that the use of examining historical cell phone records from a single tower to approximate the location of the defendant had "become suspect in the community of science as being unreliable and suspect due to i[ts] lack of precision." He noted that other methods, such as GPS and triangulation using multiple tower signal data, were more accurate and accepted by the scientific community. The prosecutor argued that the *Kelly* rule did not apply and cited numerous cases in which cell phone evidence was admitted. Following a hearing, the trial court denied defendant's request and ruled that the expert testimony was admissible.

2. Analysis

The *Kelly* rule governs the admissibility of evidence based on a new scientific methodology or technique. (*People v. Leahy* (1994) 8 Cal.4th 587, 591-592 (*Leahy*).) *Kelly* "only applies to that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is *new* to science and, even more so, the law." (*People v. Stoll* (1989) 49 Cal.3d 1136, 1156.) To be admissible, this evidence must satisfy three criteria: (1) the proponent must show that the new scientific method or technique is generally accepted as reliable in the relevant scientific community; (2) the witness providing testimony must be properly qualified as an expert; and (3) correct scientific procedures were used in the case at issue. (*Leahy*, at p. 594.) "Appellate courts review de novo the determination that a technique is subject to *Kelly*. [Citation.]" (*People v. Jackson* (2016) 1 Cal.5th 269, 316.)

People v. Garlinger (2016) 247 Cal.App.4th 1185 (*Garlinger*) is instructive. In *Garlinger*, the defendant argued that trial counsel rendered ineffective assistance by failing to object to expert testimony regarding "the general location of his cell phone in relation to various cell towers to which that phone connected during the hours before and after the robbery." (*Id.* at pp. 1190-1191.) The expert testified that the call detail records "did not enable him to pinpoint the phone's exact location at any given time, but only enabled him to determine 'the vicinity of the phone . . . in relationship to a cell site, whether it's north of the site, southwest of a site, southeast of a site and such.'" (*Id.* at p. 1192.) The *Garlinger* court rejected defendant's argument that this testimony was inadmissible under *Kelly*. (*Garlinger*, at pp. 1192, 1193-1196.) The Court of Appeal explained: "[W]hile cell phones are relatively new devices, the methodology is not new. Cell phones operate like 'sophisticated radios' by sending and receiving a radio signal to and from a cell tower and base station in their general vicinity. [Citation.] The area of the particular tower's coverage is known as a 'cell.' As the cell phone user moves from cell to cell, the wireless company transfers the call to the new cell's tower and base station. [Citation.] As previously stated, the transmission of radio signals from one place to another is a technology that has been around for more than a century. [Citation.] There is nothing new or experimental about this technology. Nor is there anything dubious about science's understanding of radio waves; as relevant here, they generally travel in a straight line. [Citation.] Thus, determining the general location of a cell phone based on which sector of the particular cell tower to which that phone's signal connected cannot be considered a 'new scientific methodology.' [Citation.]" (*Id.* at pp. 1195-1196.) The *Garlinger* court also found that this methodology was not new to the law, but was "routinely admitted in the trial courts of this state without any suggestion the *Kelly* test applies." (*Ibid.*)

We agree with the analysis in *Garlinger* that the scientific knowledge of transmitting radio signals between two locations is not a new technology. Thus, the trial court did not err when it admitted expert testimony that defendant's cell phone was in a general area based on historical cell site analysis without holding a *Kelly* hearing.

Defendant argues that *Garlinger* is distinguishable from the present case. He claims that Cook "repeatedly purported to precisely identify 'where the device was at a particular point in time' from the carrier's records indicating which cell phone antenna it had connected to, while [the expert witness in *Garlinger*] restricted himself to 'determining the general location' of the defendant's phone based merely on the antenna's compass bearing, not on the assumption that the phone would connect to the nearest tower."

First, in claiming that Cook identified the precise location of defendant's cell phone at a particular time, defendant relies on Cook's description of how he prepared the maps that were displayed to the jury. Cook explained: "Basically taking the call detail records that you saw previously, and put those into now graphic representation of that call activity, and where the device was at a particular point in time." However, Cook's remaining testimony established that he was referring not to the specific location of defendant's cell phone, but its location in relation to a particular tower and sector. More importantly, Cook testified that he could not "testify exactly where the phone was in any of these maps." Thus, the jury would not have understood that Cook was claiming to pinpoint defendant's location based on the call detail records. Second, the *Garlinger* court noted that the expert witness in that case did not testify that a cell phone will always connect to the closest tower or define the coverage area of a particular tower. (*Garlinger*, *supra*, 247 Cal.App.4th at p. 1197.) This witness testified "in terms of which general direction the phone was located in relation to the particular tower and whether or not a certain landmark, . . . was in that general area." (*Ibid.*) Similarly, here, Cook

acknowledged that cell phones did not always connect to the nearest tower, set forth the factors that can affect which tower the cell phone connected to, and explained why he believed these factors were not relevant to this case. Cook also noted that the circles depicted on the maps were an estimation of coverage and radio waves did not stop at the perimeter. Thus, we do not consider *Garlinger* distinguishable from the present case.

Relying on *Evans*, *supra*, 892 F.Supp.2d 949, defendant argues that Cook relied on the granulization theory, which had not achieved general acceptance in the relevant scientific community. In *Evans*, the government obtained historical cell tower records for the defendant's phone. (*Id.* at p. 952.) The expert witness explained that when placing a call, cell phones "typically connects to the tower in its network with the strongest signal." (*Ibid.*) The court summarized the granulization theory on which the expert witness relied: "To determine the location of a cell phone using the theory of granulization, [the expert witness] first identifies (1) the physical location of the cell sites used by the phone during the relevant time period; (2) the specific antenna used at each cell site; and (3) the direction of the antenna's coverage. He then estimates the range of each antenna's coverage based on the proximity of the tower to other towers in the area. This is the area in which the cell phone could connect with the tower given the angle of the antenna and the strength of its signal. Finally, using his training and experience, [the expert witness] predicts where the coverage area of one tower will overlap with the coverage area of another." (*Ibid.*) The expert witness concluded that the calls from the defendant's cell phone could have come from the location where the victim was being held, which fell within the coverage overlap of two towers. (*Ibid.*)

The *Evans* court first pointed out that the expert witness in that case did not fully account for factors, such as obstructions or network traffic, that could have caused the defendant's cell phone to connect to a tower other than the closest tower. (*Evans*, *supra*, 892 F.Supp.2d at p. 956.) The court also noted that the witness did not travel to the

relevant location with the specific purpose of determining whether any obstructions existed (*id.* at p. 956, fn. 7) and the calls were made from 12:54 p.m. to l:12 p.m. (*Id.* at p. 952.) The court reasoned that "[e]stimating the coverage area of radio frequency waves requires more than just training and experience, . . . it requires scientific calculations that take into account factors that can affect coverage." (*Id*. at p. 956.) The *Evans* court found that "[g]ranulization theory has not been subject to scientific testing or formal peer review and has not been generally accepted in the scientific community." (*Id.* at p. 957.) Thus, the court concluded that evidence based upon the granulization theory was not reliable. (*Ibid.*)

Defendant's reliance on *Evans* is misplaced. In contrast to the expert witness in *Evans*, Cook testified that he could not determine precisely where defendant's cell phone was on any of the maps. Cook testified that defendant's cell phone was within the radius of the towers that picked up the calls and that he was estimating the coverage of the towers. He also testified that since defendant's cell phone connected to different towers and sectors over time, it provided an indication of defendant's travel direction. Unlike the expert witness in *Evans*, Cook travelled to the locations and towers relevant to the present case to determine if the topography or any obstructions would interfere with the connection to a tower and found no major obstacles. Moreover, the calls in *Evans* were made in the middle of the day and, here, the calls were made after 11:00 p.m., which Cook characterized as an off-peak period. Thus, *Evans* is distinguishable from the case before us.[17]

3. Qualifications of Expert Witness

Defendant next contends that Cook was not qualified to testify as an expert since he lacked scientific training or education.

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[17] We also note that several cases have disagreed with *Evans*, *supra*, 892 F.Supp.2d 949. (See *State v. White* (Ohio App. 2015) 37 N.E.3d 1271, 1280, and cases cited therein.)

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) Expert testimony is appropriate on subjects that are "sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).)

"'The trial court's determination of whether a witness qualifies as an expert is a matter of discretion and will not be disturbed absent a showing of manifest abuse. [Citation.] "'Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than to its admissibility.'" [Citation.]' [Citation.]" (*People v. Nelson* (2016) 1 Cal.5th 513, 536.)

Here, Cook testified that he had experience and training in the area of cell phone operations and in the interpretation of Metro PCS and Sprint cell phone records in 2010. He began working in the cell phone industry in 1986 and worked as a sales representative for various cell phone companies for several years. During that period, he became familiar with the operation of cell phones, cell towers, and the interpretation of cell phone records. His training for each cell phone company included how its network functioned and its devices operated. He also assisted engineers in setting up new cell sites. When he worked for AT&T, he also became familiar with how its equipment operated and how cell phones interacted with towers. In 2006, Cook started his own company. Since that time, he has been analyzing carrier call detail records, text messages, and other data supplied by the cell phone company to plot where a cell phone might be located. Cook is also a certified instructor for California Peace Officers Standards and Training One and has assisted in setting up a technology course for this organization. He teaches a class on the operation of cell phones, the mapping of cell sites, the interpretation of call detail records, and how long these records are kept. Cook has personal contact "almost on a

daily basis" with different cell phone companies as to the types of records they maintain and their recordkeeping practices. Cook has qualified as a cell phone expert in state court approximately 50 times. Based on this record, the trial court did not abuse its discretion in determining that Cook was qualified to testify as an expert in the areas of cell phone operations, cell phone towers and sectors, and the interpretation of cell phone records.

Defendant also argues that Cook made no attempt to validate his theories through scientific study or analysis: he did not request records from the cell phone companies to determine radio range of the relevant cell towers; he did not conduct any testing to verify whether the information in the cell phone records supported his conclusions; he did not use a device that could measure the strength of the radio frequency waves coming from the cell towers; and he did not determine the amount of the overlap between the sectors. We first note that Cook went to the relevant locations to determine whether any obstructions would have affected his opinions. Cook's calculations were also consistent with the FBI's CAST program. As to other means of validating his opinions, this was a proper subject for voir dire and cross-examination. "'[Q]uestions regarding the validity or credibility of an expert's knowledge go to the weight of such testimony, not its admissibility.' [Citation.]" (*People v. Rodriguez* (2014) 58 Cal.4th 587, 638.) Thus, we reject defendant's argument.

B. Ineffective Assistance of Counsel

Defendant argues that trial counsel provided ineffective assistance by: (1) failing to provide the trial court with scientific authority to support his motion in limine seeking a *Kelly* hearing on the admissibility of Cook's testimony; and (2) by asking Detective Mata questions on cross-examination that opened the door to the admission of damaging evidence.

1. Legal Principles

In order to prevail on an ineffective assistance of counsel claim, the "'defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it "fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms." [Citations.] . . . If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice, that is, a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [Citation.]' [Citation.]" (*People v. Lopez* (2008) 42 Cal.4th 960, 966 (*Lopez*).) "'In determining whether counsel's performance was deficient, a court must in general exercise deferential scrutiny . . .' and must 'view and assess the reasonableness of counsel's acts or omissions . . . under the circumstances as they stood at the time that counsel acted or failed to act.' [Citation.] Although deference is not abdication [citation], courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight." (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

2. Scientific Authority to Support Motion

Trial counsel argued that scientific research questioned the reliability of determining the location of a cell phone based on the call detail records of a single cell tower. His written motion quoted *Evans's* citation to an article that stated that the granulization theory had not been tested by the scientific community and concluded that other methods of determining the location of a cell phone were more accurate. At the in limine hearing, trial counsel referred to an article entitled "Cell Tower Junk Science."[18] He also stated that there was a "significant misunderstanding in judicial circles"

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[18] Cherry, Imwinkelried, Schenk, et al., Cell Tower Junk Science (January/February 2012) 95 Judicature No. 4, p. 151. The article is available online at <https://educatedevidence.com/Viewpoint_J-F.pdf> [as of March 15, 2019], archived at <https://perma.cc/33XM-339T>

regarding this type of evidence according to Schenk and his associate. The prosecutor protested that "if there are articles that counsel is relying on, those things should have been discovered 30 days before trial." Trial counsel conceded that he did not have sufficient personal expertise to explain the scientific principles underlying his argument, but he stated that he had potential experts who had such credentials.

Defendant argues that a reasonably competent trial counsel would have supplied the trial court with copies of the two articles cited in *Evans*, *supra*, 892 F.Supp.2d at pages 953, 956, the article entitled "Cell Tower Junk Science," and three other articles to support his in limine motion. He also claims a reasonably competent counsel would have submitted a declaration by Schenk summarizing his testimony at trial. We disagree. In our view, trial counsel's reliance on *Evans* adequately supported his position that the proposed expert testimony was "wholly untested by the scientific community." (*Id.* at p. 956.) As previously discussed, however, defendant's argument was not persuasive, because it was based on the incorrect proposition that the expert in the present case would pinpoint the location of defendant's cell phone at a given time. Thus, his ineffective assistance of counsel claim fails

3. Cross-examination of Detective Mata

a. Background

During in limine motions, the trial court ruled that Armando's plea of no contest to accessory to murder was inadmissible. But the trial court also stated that it would revisit the issue if "a door is opened." During his cross-examination of Detective Mata, trial counsel asked about the detective's efforts to investigate suspects other than defendant. This exchange then followed: "Q. [Defense Counsel]: Do you solve every murder that you investigate, sir? [¶] A. [Detective Mata]: No. [¶] Q. And your objective is to solve as many murders as you can? [¶] A. Yes. With the information and evidence that we have. [¶] Q. And there are all sorts of statistics that are maintained not only by the

city of San Jose, by the state of California and by the United States government with respect to solve rate of violent crimes; correct? [¶] MR. PANDORI [Prosecutor]: Objection. Relevance. [¶] MR. LEMPERT [Defense Counsel]: Goes to bias, motive, and other interest, Your Honor. [¶] THE COURT: Overruled. [¶] THE WITNESS: It's called a clearance rate. Yes. I'm aware of that. [¶] (By Mr. Lempert): And that is an important number, isn't it? [¶] A. To some people. [¶] Q. To you? [¶] A. I do the best I can with the information I have. [¶] Q. But it's an important factor, isn't it? [¶] A. I try to solve every case I have. Yes."

Shortly thereafter, there was an unreported sidebar as well as a discussion in chambers. The trial court later summarized its ruling: "I had done a 352 analysis at the time that Mr. Pandori raised to the Court wishing to put in Mr. Armando Frausto's statements, not for the truth, but to deal with this issue of bias, and the type of investigation that was done. And I found it to be more probative than prejudicial. And, Mr. Lempert, you submitted on this issue as well." At a hearing outside the jury's presence, trial counsel explained that "[i]t was not [his] intention to open the door" and that he had asked the detective about other possible suspects. The trial court stated that "[t]he opening of the door was this issue where you talked about motive, bias, or interest in the case by using the statistics."

After the trial court admonished the jury that the testimony was "not being offered for the truth, but rather to show why the detective did what he did in terms of his investigation," the prosecutor questioned Detective Mata regarding his interview of Armando. The detective testified that defendant "had told [Armando] what he had done. That he had shot at the individuals . . . in the garage with a gun . . . that Armando described to me as a .38 revolver." He further testified that Armando told him that defendant gave him a gun the day after the shooting and asked him to get rid of it, which Armando did by selling it to someone nicknamed Elias.

During recross-examination, this exchange occurred between trial counsel and Detective Mata: "Q. You're aware that Armando Frausto, aside from any sentence with respect to this particular case, was sent to prison for an extended period of time for a variety of cases; correct? [¶] A. Yes. [¶] Q. Armando Frausto admitted that he was in possession of the weapon that killed Mr. Cobarrubias; did he not? [¶] A. Yes. [¶] Q. And Armando Frausto, among other things, tried to escape from the San Jose police officers by running across 280, and threw away a pistol while he was running away? [¶] A. That was one of the cases." Trial counsel later questioned the detective about this incident in which Armando tried to dispose of a Glock .40 caliber semi-automatic pistol.

The trial court stated: "[A]fter that door was opened and after Mr. Pandori put on the sparse, but effective, let's just say, facts before the jury, then you came back and challenged Detective Mata again with questions that had the potential to create an inference, depending on how the jury weighs the testimony, to create the inference that Armando Frausto's credibility was less than stellar because he had been convicted of other charges and because he had a sentence in this case. That's really the inference." The trial court gave trial counsel a choice: if, during argument, he challenged Armando's credibility, suggested that Armando had a motive for the shooting, or claimed that Armando was upset with defendant, Armando's conviction would be admitted; if he did not mention Armando, it would not be admitted. Trial counsel did not disclose his trial strategy and the trial court's ruling was deferred.

b. Analysis

i. Attacking the Investigation and Detective Mata's Credibility

The Attorney General argues that trial counsel made a reasonable tactical decision to attack not only Detective Mata's credibility, but also the scope of the police investigation. We reject this argument.

The defense theory was that the police focused on defendant as the shooter before investigating others, including Armando, Raymond, the Surenos, and Munoz's girlfriend. The Attorney General acknowledges that trial counsel knew that Detective Mata was not going to concede that his clearance rate was more important than the truth. He maintains, however, that trial counsel knew that the jury would learn about Armando's connection to the murder and his statements admitting the crime when Ceballos's conditional examination was admitted. Thus, he contends that asking the detective about his clearance rate would plant that possibility in the jury's mind. We first note that trial counsel stated that he had not intended to open the door to this damaging evidence, thus indicating that he had not made a strategic decision when he asked the question about Detective Mata's motive or bias. Trial counsel also never argued that the police focused on defendant because they were concerned about their clearance statistics. More importantly, while the jury eventually learned of evidence indicating that Armando had sold the gun used in the shooting to Ceballos, Ceballos did not testify that defendant admitted that he committed the shooting to Armando. Thus, defendant has shown that trial counsel's performance was deficient.

Defendant has failed to show prejudice. Here, the trial court admonished the jury that Armando's statements to Detective Mata were "not being offered for the truth, but rather to show why the detective did what he did in terms of his investigation." We presume the jury followed the trial court's instructions. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 83.) Moreover, the evidence against defendant was extremely strong. The attack on defendant, Raymond, and Garcia by VMF members provided defendant with a motive to commit the shooting. On the night of the shooting, defendant broke his date with Collins and insisted on borrowing Beltran's car, which matched the general description of the car at the crime scene. When he returned Beltran's car, he told her to put air freshener in it and would not tell her why. After he saw Beltran driving

downtown later that night, he told her to go home. The following day, he told her that he did "something dirty" and if the police contacted her, she was not to talk to them and to tell them that she did not know him. That same day, he also appeared at Sosa's apartment and told Warren that "he got the guys who got them," that he "just blasted these fools last night," and that he ran up the driveway and shot them with a .38 revolver. Sosa and Moreno also heard defendant admit that he committed a shooting. Defendant told Tarango that he used Beltran's car to "smoke somebody" to avenge the attack on Raymond. The cell phone evidence established that defendant's phone was near Beltran's residence prior to the shooting, was turned off when the shooting occurred, and was later moving away from the vicinity of the shooting. Ceballos purchased a gun and bullets, which had the same chemical composition as the fatal bullet, from Armando. Based on this record, defendant has failed to show a "'"reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." [Citation.]' [Citation.]" (*Lopez*, *supra*, 42 Cal.4th at p. 966.)

ii. Attacking Armando's Credibility

During closing argument, trial counsel argued that Armando had both motive and opportunity to commit the shooting and was either the driver or the shooter. He also pointed out that the police never investigated Armando's participation in the shooting. In our view, trial counsel made a reasonable tactical decision to attack Armando's credibility and argue that Armando was one of several other possible people who were responsible for the shooting. Thus, defendant's ineffective assistance of counsel claim fails.

C. Right to Confrontation

Defendant contends that the trial court violated his right to confrontation under the Sixth and Fourteenth Amendments by allowing the prosecutor to pose leading questions to a witness who had refused to testify.

1. Background

Prior to trial, Armando told the police that defendant had confessed that he had committed the shooting, that defendant had asked him to dispose of a gun and some bullets, and that he had traded the gun and bullets to Ceballos for $200 and drugs. The prosecutor learned that Armando would refuse to testify. The parties subsequently litigated whether the prosecutor could ask Armando a limited number of questions based on his statements to the police. Relying on *People v. Morgain* (2009) 177 Cal.App.4th 454 (*Morgain*), the trial court allowed the prosecutor to question Armando.

Though the trial court granted Armando immunity, he refused to testify at trial. The prosecutor later called Armando as a witness and asked him the following questions: (1) "[D]id you see Michael Frausto on January the 24th , 2010?"; (2) "On that day did Michael tell you that he was looking for one of the guys that had stabbed him and said, I got one last night?"; (3) "On that day did Michael say he ran up inside a garage and unloaded the whole fucking thing?"; (4) "Sometime between January 24, 2010 and March 4, 2010 did Michael Frausto give you a .38 revolver handgun and some .38 bullets in a sock and ask you to get rid of it?"; and (5) "Did you sell a .38 revolver and some bullets in a sock to a male named Elias for dope and about $200?" Armando refused to answer any of the questions, even after the trial court ordered him to do so. When defense counsel objected to further questioning after the third question, the trial court overruled the objection. Defense counsel declined to ask Armando any questions on cross-examination "based upon the stated attitude of the witness." Armando was later held in contempt and sentenced to five days in jail.

The trial court instructed the jury that counsels' comments or questions were not evidence. The jury was also specifically advised: "Do not assume that something is true just because one of the attorneys asked a question that suggested it was true."

2. Analysis

Morgain, supra, 177 Cal.App.4th 454 is very similar to the instant case. In *Morgain*, the defendant was charged with murder and Wallace, the defendant's girlfriend, told the police that defendant had confessed to the shooting. (*Id.* at pp. 456, 459.) At trial, she was granted immunity. (*Id.* at p. 460.) Wallace answered several preliminary questions, but she stated that she did not recall talking to the police. (*Ibid.*) After the prosecutor showed her the statement that she had made to the police, Wallace stated that it did not refresh her recollection. (*Ibid.*) The prosecutor asked Wallace about some of her statements to the police and she denied making them. (*Id.* at pp. 460-461.) The prosecutor then asked her the five following questions about the defendant. "'PROSECUTOR: Okay, you weren't happy, Ms. Wallace, that [defendant] was going over to Cecil Walker's house with Mr. Campbell, were you? [¶] WALLACE: Not answering it. I refuse to answer. [¶] PROSECUTOR: Did the defendant tell you he shot [Tidwell]? [¶] WALLACE: Not answering it. [¶] PROSECUTOR: Did he tell you that he shot him in the hand? Did he tell you that he shot [Tidwell] in the hand, Ms. Wallace?'" (*Id.* at p. 461.) The trial court overruled a defense objection and ordered the witness to answer the question. (*Ibid.*) The questioning continued: "'PROSECUTOR: Did the defendant tell you that after he shot [Tidwell] in the hand that the victim then said, "No man, don't shoot me, don't shoot me, don't shoot me." Did he tell you that? . . . [¶] WALLACE: (No response.) [¶] THE COURT: Ms. Wallace, I'm going to order that you answer that question or you'll be held in contempt. [¶] WALLACE: I'm not answering it. [¶] THE PROSECUTOR: Did the defendant tell you that he then shot him four more times? Did he tell you that he then shot [Tidwell] four more times?'"

(*Id*. at pp. 461-462.) The trial court later granted the defense motion to strike Wallace's testimony. (*Id.* at p. 461.) But the trial court allowed the prosecutor to argue that the jury could infer that Wallace refused to testify in order to protect the defendant. (*Ibid.*)

Noting that the trial court struck Wallace's testimony and told the jury not to consider the prosecutor's questions as evidence, the *Morgain* court stated: "'The assumption that jurors are able to follow the court's instructions fully applies when rights guaranteed by the Confrontation Clause are at issue.' [Citations.]" (*Morgain, supra*, 177 Cal.App.4th at p. 465.) The court further reasoned that the prosecutor's questions were not the "'only direct evidence'" against the defendant since two other witnesses had identified him as the shooter. (*Id.* at pp. 465-466.) Thus, the *Morgain* court concluded that there had been no violation of the defendant's right of confrontation. (*Ibid.*) The court also held that there was no violation of the defendant's due process and confrontation rights when the trial court allowed the prosecutor to argue the inference that Wallace's refusal to testify was an attempt to protect the defendant. (*Id.* at pp. 467-468.)

As in *Morgain*, here, the jury was instructed not to consider the prosecutor's questions or comments as evidence. Similarly, here, there was other evidence duplicating the prosecutor's questions. The day after the shooting, defendant confessed to Warren that he had committed the shooting, which was corroborated by Sosa and Moreno. Defendant also told Tarango that he used Beltran's car to "smoke somebody" to avenge the attack on Raymond. The testimony of Ceballos, Carmen Brito, and Anthony Brito established that Armando had disposed of the gun used by defendant. Accordingly, there was no violation of defendant's confrontation right.

Defendant argues that *Morgain* is distinguishable. He acknowledges that the trial court admonished the jury not to consider anything said by the attorneys as evidence. He claims, however, that this admonishment was confusing, because the trial court overruled

defense counsel's objection to the continued questioning of Armando when it was clear that he would not testify. *Morgain,* is not distinguishable on this ground. In *Morgain*, the trial court also overruled the defense objection to the continued questioning of the witness after she refused to testify. (*Morgain*, *supra*, 177 Cal.App.4th at pp. 461-462.)

Defendant contends *People v. Murillo* (2014) 231 Cal.App.4th 448 (*Murillo*) is directly on point. In *Murillo*, the defendant was charged with murdering a rival gang member and shooting two others. (*Id.* at p. 450.) One of the victims, Valencia, identified the defendant as the shooter the day after the shooting. (*Id.* at p. 455.) However, his identification of the defendant was equivocal and he also selected another individual from a photographic lineup. (*Ibid.*) A couple of months later, Valencia was arrested for shooting at the police. (*Ibid.*) After an investigator told him that as long as he cooperated with the officers, who were investigating the gang murder, he was "'going to be in fine shape,'" Valencia identified the defendant as the shooter. (*Ibid.*) The out-of-court statements by Valencia were crucial to the prosecution case, because it was the only eyewitness identification of the defendant. (*Ibid.*) At trial, Valencia refused to testify and did not invoke his privilege against self-incrimination. (*Id.* at p. 450.) The prosecutor was then allowed to ask him 110 leading questions about his prior statements and to show him a photographic lineup on which Valencia had identified the defendant as the shooter. (*Ibid.*) Valencia refused to answer or said he had nothing to say. (*Id.* at p. 451.) The trial court instructed the jury that the prosecutor's questions were not evidence, that there was no evidence of any statements allegedly made by the witness prior to trial, and that any documents shown to the witness were not admitted into evidence and must not be considered. (*Id.* at p. 452.)

The *Murillo* court distinguished *Morgain*, *supra*, 177 Cal.App.4th 454 by noting that the prosecutor in that case asked five leading questions and that there was strong independent evidence of the defendant's guilt. (*Murillo*, *supra*, 231 Cal.App.4th at

p. 456.) The *Murillo* court concluded that Valencia's refusal to answer over 100 leading questions while the prosecutor read from his police interviews denied the defendant his right to cross-examine Valencia. (*Ibid.*) In determining prejudice, the court stated that the evidence of the defendant's guilt was "not strong." (*Ibid.*) The court pointed out that no other witness had identified the defendant as the shooter, the jury did not learn about the equivocal nature of Valencia's identification and the investigator's offer of possible leniency if he cooperated with the police on the case, and the "DNA evidence did not cure the problem." (*Id.* at pp. 456-457.) The court also reasoned: "Ordinarily, we assume the jurors follow the trial court's instructions, even when the confrontation clause is implicated. [Citation.] But there is a point at which the prosecutor's leading questions are tantamount to evidence and overpower the proceedings so that the resulting prejudice is incurable by admonition or instruction. [Citation.] Valencia's examination reached that point." (*Id.* at p. 457.) The court held that the error required reversal under *Chapman v. California* (1967) 386 U.S. 18, 24. (*Murillo*, at p. 458.)

Murillo is distinguishable from the case before us. *Murillo* involved 110 leading questions, which essentially involved the prosecution's entire case without allowing the defendant an opportunity to cross-examine the witness. As the *Murillo* court noted, "[h]ad Valencia's examination been properly limited, the jury would have been entitled to draw negative inferences from his refusal to answer questions." (*Murillo*, *supra*, 231 Cal.App.4th at p. 458.) In contrast to *Murillo*, here, the prosecutor asked five leading questions which duplicated other evidence. Moreover, unlike in the present case, the evidence in *Murillo* was not strong.

Even assuming error, defendant has failed to show prejudice. We review confrontation clause violations under *Chapman v. California*, *supra*, 386 U.S. at page 24. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1159.) In making this determination, we

ask whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?" (*Neder v. United States* (1999) 527 U.S. 1, 18.)

Here, the trial court admonished the jurors not to consider the attorney's questions as evidence. In any event, the five leading questions duplicated other evidence presented by the prosecution. As previously discussed, the evidence against defendant was extremely strong. Defendant confessed to the shooting to Warren, which was corroborated by Sosa and Moreno. The Stutz Way stabbing provided a motive for defendant. He borrowed Beltran's car, which matched the general description of the car at the crime scene, and made very incriminating statements to her and Tarango. There was also cell phone evidence, Ceballos's purchase of a gun and bullets from Armando, and evidence of defendant's consciousness of guilt. Based on this record, any error was harmless beyond a reasonable doubt.

D. Admissibility of Evidence that Munoz Was the Target of the Shooting

Defendant contends that the trial court violated his right to present a defense by excluding evidence that Munoz was a target of the shooting and that individuals other than defendant had a motive to shoot him.

1. Background

On August 15, 2010, a victim disclosed to her parents that Munoz, her half brother, raped her in December 2009. Munoz was arrested for two rape charges (§ 261, subd. (a)(3), (4)) in September 2010. The charges were dismissed and Munoz was convicted of incest (§ 285). Defense counsel sought the admission of this conviction. He pointed out that Munoz had acknowledged at the preliminary examination that he believed he was the target of the shooting because he had left the VMF, which would negate the prosecution theory regarding defendant's motive for the shooting. He also argued that Munoz's conduct underlying the incest conviction "may have preceded the

shooting" and "even gang members would not cotton to one of their own engaging in incestuous conduct, and that could give an additional motive for gang members wanting to harm" Munoz. The prosecutor argued that the defense had failed to make an offer of proof as to whether the victim told Norteno gang members about the conduct or that Norteno gang members acted on this information. The trial court ruled that the conviction was admissible for impeachment, but the defense was not allowed to ask questions that attempted to connect the conduct underlying the incest conviction and the shooting. The trial court continued: "If something comes up during the course of Mr. Munoz's testimony that you believe it is appropriate for the Court to reconsider your being able to somehow connect the acts of 2009 to this particular shooting, I'm willing to hear that. But based upon what I'm hearing right now, it is too attenuated, and under 352 not particularly probative." Munoz testified that he suffered an incest conviction in 2010. Defense counsel did not request that the trial court reconsider its prior ruling.

Defense counsel also attempted to ask Munoz about a prior incident in which his brother was shot in a drive-by shooting two years before the shooting in this case. The trial court sustained the prosecutor's objection on the ground of relevance.

2. Analysis

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690, quoting *California v. Trombetta* (1984) 467 U.S. 479, 485.)

Evidence Code section 210 defines relevant evidence as "evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

The trial court has discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the

issues, or of misleading the jury." (Evid. Code, § 352.) An appellate court will not disturb a trial court's exercise of discretion in admitting or excluding evidence "except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

In the present case, the incest incident was not relevant. Since this incident was not disclosed until several months after the shooting, it did not tend to prove that someone other than defendant shot into Cobarrubias's garage. Similarly, evidence that Munoz's brother had been shot two years previously did not tend to prove that Munoz was the target in this shooting. Thus, the trial court did not abuse its discretion in limiting the cross-examination of Munoz.

We also note that "[a]s a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' [Citations.] Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.] If the trial court misstepped, '[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense.' [Citation.] Accordingly, the proper standard of review is that announced in *People v. Watson* (1956) 46 Cal.2d 818, 836, and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension [citation]." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

Here, even assuming error, defendant has not shown prejudice. The evidence against defendant was extremely strong. He confessed to the shooting to Warren, Sosa, and Moreno and made very incriminating statements to Beltran and Tarango. He had both a motive and an opportunity to commit the shooting. He borrowed a vehicle, which

matched the description of the car at the crime scene. There was also cell phone evidence, evidence that Armando sold the gun and bullets to Ceballos, and evidence of defendant's consciousness of guilt. In addition, there was evidence that Munoz initially believed that he was the target due to problems with his former girlfriend or with Sureno gang members. Based on this record, it is not reasonably probable the verdict would have been more favorable if the trial court had admitted the evidence.

E. Cumulative Prejudice

Defendant contends that he was deprived of a fair trial under the Fifth, Sixth, and Fourteenth Amendments due to cumulative prejudice from multiple errors. "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) Given that we have not found a series of errors, there is no cumulative prejudice.

F. Section 12022.53

The trial court sentenced defendant to consecutive terms of 25 years to life for each of the five firearm enhancements under former section 12022.53, subdivision (d).

When defendant was sentenced, former section 12022.53 prohibited the trial court from striking "an allegation under this section or a finding bringing a person within the provisions of this section." (Former § 12022.53, subd. (h); see Stats. 2010, ch. 711, § 5.) However, section 12022.53 was amended effective January 1, 2018. Section 12022.53, subdivision (h) now provides: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2.)

Relying on the retroactivity principles in *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) and *People v. Francis* (1969) 71 Cal.2d 66 (*Francis*), defendant contends that the case must be remanded for resentencing to allow the trial court to consider whether to strike the former section 12022.53 enhancements.[19]

The *Estrada* court set forth an exception to the general rule that changes in the law apply prospectively: "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*Estrada*, *supra*, 63 Cal.2d at p. 745.)

The *Francis* court determined that the same exception applied when a statutory amendment gave the trial court discretion to impose a lower sentence. In that case, the defendant was convicted of committing a felony drug offense. While his case was pending on appeal, the statute was amended to change the drug offense from a straight felony to a wobbler that could be charged as a felony or a misdemeanor. The court determined that the amendment was retroactive under the principles of *Estrada*. (*Francis*, *supra*, 71 Cal.2d at pp. 75-78.) The court reasoned that while the amendment did not guarantee the defendant a lower sentence, making the crime punishable as a misdemeanor showed a legislative intent that punishing the offense as a felony might be too severe in certain cases. (*Id.* at p. 76.)

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[19] The parties agree that defendant's claim has become ripe during the pendency of his appeal.

The Attorney General concedes that the amended section 12022.53 applies to defendant retroactively. He argues, however, that defendant is not entitled to remand and resentencing, because there is no reasonable likelihood that the trial court would dismiss or strike the firearm enhancements.

"Generally, when the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.]" (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) "However, '[i]f the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required.' [Citations.]" (*People v. Gamble* (2008) 164 Cal.App.4th 891, 901.) More recently, the court in *People v. McDaniels* (2018) 22 Cal.App.5th 420 (*McDaniels*) considered the appropriate standard to "apply in assessing whether to remand a case for resentencing in light of Senate Bill [No.] 620." (*Id.* at p. 425.) The *McDaniels* court held that "a remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement." (*Ibid.*) Where the trial court has "express[ed] its intent to impose the maximum sentence permitted . . . a remand would be an idle act because the record contains a clear indication that the court will not exercise its discretion in the defendant's favor. [Citation.]" (*Id.* at p. 427.) As the *McDaniels* court also observed: "Firearm enhancements carry heavy terms and in many cases constitute much if not most of the total sentence. Given these high stakes, it seems to us that a reviewing court has all the more reason to allow the trial court to decide in the first instance whether these enhancements should be stricken, even when the reviewing court considers it reasonably probable that the sentence will not be modified on remand." (*Id.* at p. 427, fn. omitted.)

Here, in imposing all five terms consecutively, the trial court stated that the crime involved great violence, the victims were particularly vulnerable, and that a surprise ambush showed the "most disgraceful form[] of cowardice . . . ." The trial court then cited the methodical planning of the crime and defendant's boasting about the crime, which "demonstrated a particularly cold, callous, and reckless disregard for human life." However, the trial court also stated: "And I came across a type of law that talked about consecutive life sentences and the fact that the Court of Appeal and our Supreme Court sometimes have difficulty with, for lack of a better term, just piling it on. So one of the concerns this court has is with that body of case law, and this court attempted to address that body of case law by running count 6 concurrent." Since the trial court did not exercise its discretion to maximize defendant's sentence, we agree with defendant that remand is appropriate in this case to allow the trial court the opportunity to exercise its discretion as to whether to strike the firearm enhancements.

G. Section 3051

Defendant contends that he is entitled to a remand for the purpose of making a record of facts relevant to the youth offender parole hearing he will receive during his 25th year of incarceration.

Section 3051, which became effective January 1, 2014, was enacted to bring juvenile sentencing into conformity with the limitations imposed by the Eighth Amendment. (*People v. Franklin* (2016) 63 Cal.4th 261, 268, 277 (*Franklin*).) As originally enacted, section 3051 provided that "[a] person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing

pursuant to other statutory provisions." (Former § 3051, subd. (b)(3).) Effective January 1, 2016, the Legislature amended section 3051 to extend its application to offenders who were under 23 years of age at the time of their controlling offense. (Stats. 2015, ch. 471, § 1.) As of January 1, 2018, section 3051 applies to those who committed controlling offenses when they were 25 years of age or younger. (Stats. 2017, ch. 675, § 1.)

Defendant was born on October 14, 1987. The shooting that resulted in the murder conviction occurred on January 24, 2010. Thus, defendant was 22 years old when he committed the controlling offense. Defendant's sentencing hearing was held on March 27, 2015. At that time, section 3051 applied only to defendants who committed their controlling offenses before their 18th birthdays.

The California Supreme Court has held that section 3051 applies retrospectively to all eligible youth offenders regardless of the date of conviction. (*Franklin*, *supra*, 63 Cal.4th at p. 278.) In *Franklin*, the court remanded "the matter to the trial court for a determination of whether Franklin was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Id.* at p. 284.) The court stated that "[i]f the trial court determines that Franklin did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. Franklin may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that

the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law.'" (*Franklin*, at p. 284.)

The Attorney General agrees that a remand is appropriate. Accordingly, we will remand the matter for the trial court to determine whether defendant had an adequate opportunity to make an adequate record of his characteristics and circumstances at the time of his offense in anticipation of a future youth offender parole hearing.

H. Abstract of Judgment

Defendant contends, and the Attorney General concedes, that the abstract of judgment must be modified to reflect that the sentence on count 6 is concurrent.

"An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Where there is "an evident discrepancy between the abstract of judgment and the judgment that the reporter's transcript . . . reflect[s], the appellate court itself should order the trial court to correct the abstract of judgment." (*Id.* at p. 188.)

Here, the abstract of judgment lists the six firearm enhancements under former section 12022.53, but it does not list the charge for count 6 or that the sentence on count 6 is concurrent. Both the trial court's oral pronouncement and the minutes reflect that the court intended to impose a concurrent sentence on count 6. Accordingly, the abstract of judgment must be modified.

III. Disposition

The judgment is reversed. On remand, the trial court is directed to modify the abstract of judgment to reflect that the trial court imposed a concurrent term on count 6. The trial court is also directed to consider whether to exercise its discretion to strike the former section 12022.53 enhancements under section 1385. If the trial court decides to strike any enhancement, it shall resentence defendant. If the trial court decides not to strike any enhancements, it shall reinstate the judgment. The trial court is directed to determine whether defendant was afforded an adequate opportunity to make a record of information that will be relevant in a future parole eligibility hearing held pursuant to section 3051, and, if not, to allow defendant and the People an adequate opportunity to make such a record.

_____
Mihara, J.

WE CONCUR:

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Greenwood, P. J.

_____
Elia, J.

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